

AMENDED IN SENATE MARCH 24, 2011

SENATE BILL

No. 665

Introduced by Senator La Malfa

February 18, 2011

~~An act relating to water.~~ *An act to amend Sections 1600, 1602, 1605, 1610, 1615, and 2087 of the Fish and Game Code, relating to water diversions.*

LEGISLATIVE COUNSEL'S DIGEST

SB 665, as amended, La Malfa. ~~Water: public trust doctrine: groundwater.~~ *Lake and streambed alteration agreements: endangered species.*

(1) Existing law prohibits a person, a state or local governmental agency, or a public utility from substantially diverting or obstructing the natural flow of, or substantially changing or using any material from the bed, channel, or bank of, any river, stream, or lake, or depositing or disposing of debris, waste, or other material containing crumbled, flaked, or ground pavement where it may pass into any river, stream, or lake, unless prescribed requirements are met, including written notification to the Department of Fish and Game regarding the activity. Existing law requires the department to determine whether the activity may substantially adversely affect an existing fish and wildlife resource and, if so, to provide a draft lake or streambed alteration agreement to the person, agency, or utility. Existing law prescribes various requirements for lake and streambed alteration agreements. Existing law also establishes various exemptions, including exemptions for specified emergency work and certain agreements relating to water supply, drainage, flood control, or waste treatment and disposal

facilities attained prior to January 1, 1977, after the initial notification and agreement.

This bill would modify that prohibition to prohibit the installation of a new diversion or means of diversion, or the substantial alteration of an existing means of diversion, that will substantially affect a river, stream, or lake as described above, unless prescribed requirements are met.

The bill would delete that exemption for pre-1977 agreements, and, instead exempt from the notice and agreement requirements, after the initial notification and agreement, an activity that involves the routine maintenance and operation of water supply, drainage, flood control, or waste treatment and disposal facilities constructed and in existence before 2000, unless the work has substantially changed or conditions affecting fish and wildlife resources have substantially changed, and those resources may be adversely affected by the activity conducted under the agreement. The bill would require the department to contact the entity performing the activity and suggest alternative means of maintaining and operating the facilities consistent with maintaining the full use and function of the facilities and the full use of any water diverted or used by or through those facilities. The bill would establish enforcement procedures if no agreement is reached.

The bill would also exempt immediate emergency work necessary to maintain the use of facilities employed and regularly used for the diversion or discharge of water.

(2) The California Endangered Species Act, until January 1, 2014, exempts from its provisions the accidental take of candidate, threatened, or endangered species resulting from acts that occur on a farm or a ranch in the course of otherwise lawful routine and ongoing agricultural activities.

This bill would expand the exemption to include all acts in the course of otherwise lawful routine and ongoing agricultural activities, without regard to location. The bill would specify that those acts include the diversion of water and use of water for agricultural purposes.

~~Under the public trust doctrine, the State Water Resources Control Board is required to take the public trust into account in the planning and allocation of water resources and to protect the public trust whenever feasible.~~

~~This bill would state the intent of the Legislature to enact legislation that would clarify that the public trust doctrine does not extend to groundwater.~~

Vote: majority. Appropriation: no. Fiscal committee: ~~no~~-yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. *Section 1600 of the Fish and Game Code is*
2 *amended to read:*

3 1600. The Legislature finds and declares that the protection
4 and conservation of the fish and wildlife resources of this state are
5 of utmost public interest. Fish and wildlife are the property of the
6 people and provide a major contribution to the economy of the
7 state, as well as providing a significant part of the people's food
8 supply; therefore their conservation is a proper responsibility of
9 the state. This chapter is enacted to provide conservation for these
10 resources *and certainty and consistency with other requirements*
11 *of law.*

12 SEC. 2. *Section 1602 of the Fish and Game Code is amended*
13 *to read:*

14 1602. (a) An entity ~~may~~ *shall not install a new diversion or*
15 *means of diversion, or substantially alter an existing means of*
16 *diversion, that will* substantially divert or obstruct the natural flow
17 of, or substantially change or use any material from the bed,
18 channel, or bank of, any river, stream, or lake, or deposit or dispose
19 of debris, waste, or other material containing crumbled, flaked, or
20 ground pavement where it may pass into any river, stream, or lake,
21 unless all of the following occur:

22 (1) The department receives written notification regarding the
23 activity in the manner prescribed by the department. The
24 notification shall include, but is not limited to, all of the following:

25 (A) A detailed description of the project's location and a map.

26 (B) The name, if any, of the river, stream, or lake affected.

27 (C) A detailed project description, including, but not limited to,
28 construction plans and drawings, if applicable.

29 (D) A copy of any document prepared pursuant to Division 13
30 (commencing with Section 21000) of the Public Resources Code.

31 (E) A copy of any other applicable local, state, or federal permit
32 or agreement already issued.

33 (F) Any other information required by the department.

34 (2) The department determines the notification is complete in
35 accordance with Chapter 4.5 (commencing with Section 65920)

1 of Division 1 of Title 7 of the Government Code, irrespective of
2 whether the activity constitutes a development project for the
3 purposes of that chapter.

4 (3) The entity pays the applicable fees, pursuant to Section 1609.

5 (4) One of the following occurs:

6 ~~(A)~~

7 ~~(i)~~

8 (A) (i) The department informs the entity, in writing, that the
9 activity will not substantially adversely affect an existing fish or
10 wildlife resource, and that the entity may commence the activity
11 without an agreement, if the entity conducts the activity as
12 described in the notification, including any measures in the
13 notification that are intended to protect fish and wildlife resources.

14 (ii) Each region of the department shall log the notifications of
15 activities where no agreement is required. The log shall list the
16 date the notification was received by the department, a brief
17 description of the proposed activity, and the location of the activity.
18 Each item shall remain on the log for one year. Upon written
19 request by any person, a regional office shall send the log to that
20 person monthly for one year. A request made pursuant to this
21 clause may be renewed annually.

22 (B) The department determines that the activity may
23 substantially adversely affect an existing fish or wildlife resource
24 and issues a final agreement to the entity that includes reasonable
25 measures necessary to protect the resource, and the entity conducts
26 the activity in accordance with the agreement.

27 (C) A panel of arbitrators issues a final agreement to the entity
28 in accordance with subdivision (b) of Section 1603, and the entity
29 conducts the activity in accordance with the agreement.

30 (D) The department does not issue a draft agreement to the
31 entity within 60 days from the date notification is complete, and
32 the entity conducts the activity as described in the notification,
33 including any measures in the notification that are intended to
34 protect fish and wildlife resources.

35 (b) ~~(1)~~ If an activity involves the routine maintenance and
36 operation of water supply, drainage, flood control, or waste
37 treatment and disposal facilities *constructed and in existence before*
38 *2000*, notice to and agreement with the department shall not be
39 required after the initial notification and agreement, unless the
40 department determines either of the following:

1 ~~(A)~~

2 ~~(1) The work described in the agreement has substantially~~
3 ~~changed.~~

4 ~~(B)~~

5 (2) Conditions affecting fish and wildlife resources have
6 substantially changed, and those resources ~~are~~ *may be* adversely
7 affected by the activity conducted under the agreement.

8 ~~(2) This subdivision applies only if notice to, and agreement~~
9 ~~with, the department was attained prior to January 1, 1977, and~~
10 ~~the department has been provided a copy of the agreement or other~~
11 ~~proof of the existence of the agreement that satisfies the~~
12 ~~department, if requested.~~

13 (c) (1) *Under either paragraph (1) or (2) of subdivision (b),*
14 *the department shall contact the entity performing the activity and*
15 *suggest alternative means of maintaining and operating the*
16 *facilities consistent with maintaining the full use and function of*
17 *the facilities and the full use of any water diverted or used by or*
18 *through those facilities. The entity and the department shall meet*
19 *and confer in good faith in regard to the issues. The department*
20 *shall not utilize threats of criminal proceedings or fines under this*
21 *chapter or threats of application of any other provision of state*
22 *or federal law prior to or during the meet and confer process.*

23 ~~(e)~~

24 (2) *If no agreement is reached, and the diversion of water or*
25 *discharge of water is subject to the jurisdiction of a state court or*
26 *the State Water Resources Control Board, the department may file*
27 *a complaint or petition to require changes in the maintenance or*
28 *operation of the facilities with the agency having jurisdiction.*

29 (3) *If the diversion of water or discharge of water is not subject*
30 *to jurisdiction of a state court or the State Water Resources Control*
31 *Board, the department may file an action for public nuisance with,*
32 *and maintain that action in, the Superior Court having jurisdiction*
33 *over the site of the subject activity. If the court determines that the*
34 *activity constitutes a public nuisance because of conditions*
35 *described in paragraph (2) of subdivision (b) and that the new*
36 *practices or conditions required to avoid or abate the public*
37 *nuisance place additional costs or economic burdens suffered and*
38 *required to be incurred to remedy the public nuisance on the*
39 *diverter or the entity performing the operation and maintenance*
40 *of the facilities, the additional costs or economic burdens shall be*

1 *deemed a taking of property for the public purpose of protection*
2 *of fish and wildlife resources and shall be compensated by the*
3 *department in order to maintain reasonable certainty to persons,*
4 *business entities, and public entities within the state and to remedy*
5 *the nuisance conditions.*

6 (d) It is unlawful for any person to violate this chapter.

7 SEC. 3. Section 1605 of the Fish and Game Code is amended
8 to read:

9 1605. (a) (1) Except as otherwise provided in this section, the
10 term of an agreement *regarding the installation of a new diversion*
11 *or means of diversion or the substantial alteration of an existing*
12 *means of diversion that will substantially affect a river, stream,*
13 *or lake as provided in subdivision (a) of Section 1602* shall not
14 exceed five years.

15 (2) Notwithstanding paragraph (1), after the agreement expires,
16 the entity shall remain responsible for implementing any mitigation
17 or other measures specified in the agreement to protect fish and
18 wildlife resources.

19 (b) ~~Any~~—The entity may request one extension of a
20 previously-approved agreement, if the entity requests the extension
21 prior to the expiration of its original term. The department shall
22 grant the extension unless it determines that the agreement requires
23 modification because the measures contained in the agreement no
24 longer protect the fish and wildlife resources that the activity may
25 substantially adversely affect. In the event the department makes
26 that determination, the department shall propose measures intended
27 to protect those resources.

28 (c) If the entity disagrees with the department's determination
29 that the agreement requires modification to protect fish and wildlife
30 resources or with the measures proposed by the department, the
31 disagreement shall be resolved pursuant to the procedures described
32 in subdivision (b) of Section 1603.

33 (d) The department ~~may~~ *shall* not extend an agreement for more
34 than five years.

35 (e) (1) An original agreement shall remain in effect until the
36 department grants the extension request, or new measures are
37 imposed to protect fish and wildlife resources by agreement or
38 through the arbitration process.

(2) Notwithstanding paragraph (1), an original agreement ~~may~~ *shall* not remain in effect for more than one year after its expiration date.

(f) If the entity fails to submit a request to extend an agreement prior to its expiration, the entity shall submit a new notification before commencing or continuing the activity covered by the agreement.

(g) Notwithstanding paragraph (1) of subdivision (a), the department may issue an agreement, that otherwise meets the requirements of this chapter, for a term longer than five years if the following conditions are satisfied:

(1) The information the entity provides to the department in its notification meets the requirements of paragraph (1) of subdivision (a) of Section 1602.

(2) The entity agrees to provide a status report to the department every four years. The status report shall be delivered to the department no later than 90 days prior to the end of each four-year period, and shall include all of the following information:

(A) A copy of the original agreement.

(B) The status of the activity covered by the agreement.

(C) An evaluation of the success or failure of the measures in the agreement to protect the fish and wildlife resources that the activity may substantially adversely affect.

(D) A discussion of any factors that could increase the predicted adverse impacts on fish and wildlife resources, and a description of the resources that may be adversely affected.

(3) The department shall review the four-year status report, and conduct an onsite inspection to confirm that the entity is in compliance with the agreement and that the measures in the agreement continue to protect the fish and wildlife resources. If the department determines that the measures in the agreement no longer protect the fish and wildlife resources that are being substantially adversely affected by the activity, the department, in consultation with the entity, and within 45 days of receipt of the report, shall impose one or more new measures to protect the fish and wildlife resources affected by the activity. If requested to do so by the entity, the department shall make available the information upon which it determined the agreement no longer protects the affected fish and wildlife resources. If the entity disagrees with one or more of the new measures, within seven

1 days of receiving the new measures, it shall notify the department,
2 in writing, of the disagreement. The entity and the department shall
3 consult regarding the disagreement. The consultation shall be
4 completed within seven days after the department receives the
5 entity's notice of disagreement. If the department and entity fail
6 to reach agreement, the entity may request, in writing, the
7 appointment of a panel of arbitrators to resolve the disagreement.
8 The panel of arbitrators shall be appointed within 14 days of the
9 completed consultation. The panel of arbitrators shall issue a
10 decision within 14 days of the date it is established. All other
11 provisions of subdivision (b) of Section 1603 regarding the panel
12 shall apply to any arbitration panel established in accordance with
13 this subdivision. If the entity fails to provide timely status reports
14 as required by this subdivision, the department may suspend or
15 revoke the agreement.

16 (4) The agreement shall authorize department employees to
17 conduct onsite inspections relevant to the agreement, upon
18 reasonable notice. Nothing in this section limits the authority of
19 department employees to inspect private or public sites.

20 (5) Except as provided in paragraph (3), subparagraph (D) of
21 paragraph (4) of subdivision (a) of Section 1602 and the time
22 periods to process agreements specified in this chapter do not apply
23 to agreements issued pursuant to this section.

24 (h) Each region of the department shall log the notifications of
25 activities for which a long-term agreement is being considered
26 pursuant to subdivision (g). The log shall list the date the
27 notification was received by the department, a brief description of
28 the proposed activity, and the location of the activity. Each item
29 shall remain on the log for one year. Upon written request by any
30 person, a regional office shall send the log to that person monthly
31 for one year. A request made pursuant to this paragraph may be
32 renewed annually.

33 *SEC. 4. Section 1610 of the Fish and Game Code is amended*
34 *to read:*

35 1610. (a) Except as provided in subdivision (b), this chapter
36 does not apply to any of the following:

37 (1) Immediate emergency work necessary to protect life or
38 property.

1 (2) *Immediate emergency work necessary to maintain the use*
2 *of facilities employed and regularly used for the diversion or*
3 *discharge of water.*

4 ~~(2)~~

5 (3) Immediate emergency repairs to public service facilities
6 necessary to maintain service as a result of a disaster in an area in
7 which a state of emergency has been proclaimed by the Governor
8 pursuant to Chapter 7 (commencing with Section 8550) of Division
9 1 of Title 2 of the Government Code.

10 ~~(3)~~

11 (4) Emergency projects undertaken, carried out, or approved
12 by a state or local governmental agency to maintain, repair, or
13 restore an existing highway, as defined in Section 360 of the
14 Vehicle Code, within the existing right-of-way of the highway,
15 that has been damaged as a result of fire, flood, storm, earthquake,
16 land subsidence, gradual earth movement, or landslide, within one
17 year of the damage. Work needed in the vicinity above and below
18 a highway may be conducted outside of the existing right-of-way
19 if it is needed to stop ongoing or recurring mudslides, landslides,
20 or erosion that pose an immediate threat to the highway, or to
21 restore those roadways damaged by mudslides, landslides, or
22 erosion to their predamage condition and functionality. This
23 paragraph does not exempt from this chapter any project
24 undertaken, carried out, or approved by a state or local
25 governmental agency to expand or widen a highway damaged by
26 fire, flood, storm, earthquake, land subsidence, gradual earth
27 movement, or landslide. The exception provided in this paragraph
28 does not apply to a highway designated as an official state scenic
29 highway pursuant to Section 262 of the Streets and Highways
30 Code.

31 (b) The entity performing the emergency work described in
32 subdivision (a) shall notify the department of the work, in writing,
33 within 14 days of beginning the work. Any work described in the
34 emergency notification that does not meet the criteria for the
35 emergency work described in subdivision (a) is a violation of this
36 chapter if the entity did not first notify the department in
37 accordance with Section 1602.

38 *SEC. 5. Section 1615 of the Fish and Game Code is amended*
39 *to read:*

1 1615. (a) A person who violates ~~this chapter~~ *Section 1602* is
2 subject to a civil penalty of not more than twenty-five thousand
3 dollars (\$25,000) for each violation.

4 (b) The civil penalty imposed pursuant to subdivision (a) is
5 separate from, and in addition to, any other civil penalty imposed
6 pursuant to this section or any other provision of the law.

7 (c) In determining the amount of any civil penalty imposed
8 pursuant to this section, the court shall take into consideration all
9 relevant circumstances, including, but not limited to, the nature,
10 circumstance, extent, and gravity of the violation. In making this
11 determination, the court may consider the degree of toxicity and
12 volume of the discharge, the extent of harm caused by the violation,
13 whether the effects of the violation may be reversed or mitigated,
14 and, with respect to the defendant, the ability to pay, the effect of
15 any civil penalty on the ability to continue in business, any
16 voluntary cleanup efforts undertaken, any prior history of
17 violations, the gravity of the behavior, the economic benefit, if
18 any, resulting from the violation, and any other matters the court
19 determines that justice may require.

20 (d) Every civil action brought under this section shall be brought
21 by the Attorney General upon complaint by the department, or by
22 the district attorney or city attorney in the name of the people of
23 the State of California, and any actions relating to the same
24 violation may be joined or consolidated.

25 (e) (1) In any civil action brought pursuant to this chapter in
26 which a temporary restraining order, preliminary injunction, or
27 permanent injunction is sought, it is not necessary to allege or
28 prove at any stage of the proceeding any of the following:

29 (A) That irreparable damage will occur if the temporary
30 restraining order, preliminary injunction, or permanent injunction
31 is not issued.

32 (B) That the remedy at law is inadequate.

33 (2) The court shall issue a temporary restraining order,
34 preliminary injunction, or permanent injunction in a civil action
35 brought pursuant to this chapter without the allegations and without
36 the proof specified in paragraph (1).

37 (f) All civil penalties collected pursuant to this section shall not
38 be considered fines or forfeitures as defined in Section 13003, and
39 shall be apportioned in the following manner:

1 (1) Fifty percent shall be distributed to the county treasurer of
2 the county in which the action is prosecuted. Amounts paid to the
3 county treasurer shall be deposited in the county fish and wildlife
4 propagation fund established pursuant to Section 13100.

5 (2) Fifty percent shall be distributed to the department for
6 deposit in the Fish and Game Preservation Fund. These funds may
7 be expended to cover the costs of any legal actions or for any other
8 law enforcement purpose consistent with Section 9 of Article XVI
9 of the California Constitution.

10 *SEC. 6. Section 2087 of the Fish and Game Code is amended*
11 *to read:*

12 2087. (a) Accidental take of candidate, threatened, or
13 endangered species resulting from acts, *including, but not limited*
14 *to, the diversion of water and use of water for agricultural*
15 *purposes*, that occur on *or outside of the site of* a farm or a ranch
16 in the course of otherwise lawful routine and ongoing agricultural
17 activities is not prohibited by this chapter.

18 (b) This section shall remain in effect only until January 1, 2014,
19 and as of that date is repealed, unless a later enacted statute, that
20 is enacted before January 1, 2014, deletes or extends that date.

21 ~~SECTION 1. It is the intent of the Legislature to enact~~
22 ~~legislation that would clarify that the public trust doctrine does~~
23 ~~not extend to groundwater.~~